

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

APR 28 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0261
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DINAUSH NATHANIEL LEWIS,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092288001

Honorable Deborah Bernini, Judge

AFFIRMED AS CORRECTED

John William Lovell

Tucson
Attorney for Appellant

ECKERSTROM, Judge.

¶1 After a jury trial, appellant Dinaush Lewis was convicted of kidnapping and aggravated assault causing serious physical injuries, both domestic violence offenses, and administering intoxicating liquors. Finding Lewis had two historical prior felony convictions, the trial court sentenced him to enhanced, substantially aggravated, concurrent prison terms, the longest of which was thirty-five years. Counsel has filed a

brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), raising several issues that counsel characterizes as having “the appearance of arguable issues.” We address these issues below. Appellant has not filed a supplemental brief.

¶2 Counsel first suggests there were three instances of what might be regarded as prosecutorial misconduct. First, he asserts, the prosecutor called the victim to testify “knowing or having reason to know that [she] would perjure herself.” He points to a portion of the prosecutor’s opening statement in which she told the jurors they would hear evidence that the prosecutor had interviewed the victim before trial and the victim had suggested someone other than Lewis had assaulted her; the prosecutor warned the jury, “She’ll probably tell you that . . . Cavanell [did it], . . . she probably will.”

¶3 Counsel concedes Lewis did not raise this claim below or object to the victim’s testimony and that the claim is one more appropriately asserted in a petition for post-conviction relief, presumably as a claim of ineffective assistance of counsel. *See* Ariz. R. Crim. P. 32.1; *see also State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) (claims of ineffective assistance of counsel must be raised in a post-conviction proceeding and will not be addressed if raised on direct appeal).

¶4 By failing to object to the alleged prosecutorial misconduct at trial, Lewis waived the right to seek relief for all but fundamental error. *State v. Wood*, 180 Ariz. 53, 66, 881 P.2d 1158, 1171 (1994). “To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial.” *State v. Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d 601, 608 (2005). And to be entitled to relief, a defendant must establish the error was both fundamental and

prejudicial. *See id.* ¶ 26. In the context of prosecutorial misconduct, the record must establish the defendant could not have received a fair trial. *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993).

¶5 We see no misconduct here, much less misconduct that resulted in fundamental, prejudicial error. The knowing use of false or perjured testimony is a denial of due process if there is a reasonable likelihood that the false testimony could have affected the jury's judgment. *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989). A prosecutor is guilty of misconduct in this context if she knowingly elicits from a witness a false statement that is material to the state's case. *Id.*

¶6 Here, the prosecutor was faced with a victim who had made numerous statements before trial to various individuals and changed her story multiple times. Nothing in the record suggests the prosecutor knew precisely how the victim would testify at trial. The prosecutor was simply preparing the jury for the fact that the victim had implicated Lewis at one point but was a reluctant witness for the state, suggesting during opening statement and closing argument this was because of the abusive and ongoing relationship between the victim and Lewis. The prosecutor pointed out other witnesses had given contradictory statements as well. But "[c]ontradictions and changes in a witness's testimony alone do not constitute perjury and do not create an inference, let alone prove, that the prosecution knowingly presented perjured testimony." *Tapia v. Tansy*, 926 F.2d 1554, 1563 (10th Cir. 1991). In other words, the mere fact that a witness made inconsistent statements and is called to testify for the state does not establish the prosecutor knowingly elicited false testimony. *United States v. Griley*, 814 F.2d 967, 971 (4th Cir.1987); *see also State v. Ferrari*, 112 Ariz. 324, 334, 541 P.2d 921, 931 (1975)

(prosecutor may call witness to testify even if witness made prior inconsistent statements, without committing misconduct).

¶7 Moreover, Lewis was not prejudiced by the fact that the prosecutor had called the victim to testify knowing she might not tell the truth. There was other, strong evidence Lewis had assaulted the victim. As the court commented when it denied Lewis's motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., which focused on the problems with identification in the case and the victim's inconsistent statements and ultimate insistence someone else had assaulted her, at least one witness had provided "direct evidence" which, together with "other testimony," provided the jury with sufficient evidence to "find the Defendant guilty."

¶8 Counsel also suggests the prosecutor committed misconduct by improperly presenting evidence of Lewis's previous acts when she played the audio recording of the 9-1-1 telephone call Cavanell M. had made the evening the victim had been assaulted. Cavanell had heard portions of the assault because he had called the victim on her cellular telephone and she had answered the call. On that recording Cavanell told the operator Lewis had previously assaulted the victim. As counsel concedes, however, Lewis did not object when the tape was played, and raised the issue for the first time in a motion for new trial, which was untimely filed but which the trial court nevertheless denied on the merits. *See* Ariz. R. Crim. P. 24.1(b) (motion for new trial must be filed no later than ten days after verdict rendered). Thus, counsel correctly acknowledges (1) the issue is more appropriately raised in a post-conviction proceeding and (2) Lewis forfeited the right to relief for all but fundamental, prejudicial error. *See Wood*, 180 Ariz. at 66, 881 P.2d at 1171.

¶9 Even assuming the evidence of the prior acts was inadmissible, *see generally* Rule 404(b), Ariz. R. Evid., based on the record before us, any error in this regard cannot be characterized as fundamental. And even though the evidence was presumably prejudicial to some degree, it was not so unduly prejudicial as to have deprived Lewis of a fair trial. *See* Ariz. R. Evid. 403, 404(b); *cf. State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993) (finding mere prejudice not basis for exclusion of evidence under Rule 403; acknowledging evidence can be harmful but not unfairly prejudicial).

¶10 As the final instance of possible prosecutorial misconduct, counsel points out that, during closing argument, the prosecutor attempted to explain the victim's inconsistent statements and suggestion that someone other than Lewis had assaulted her, by remarking that victims of domestic violence often recant prior accusations and minimize or change their initial version of what had occurred. Counsel suggests the statement was improper because there was no expert testimony to support the prosecutor's explanation. But again, counsel notes Lewis did not object and forfeited the right to relief for all but fundamental, prejudicial error, suggesting Lewis has a possible claim of ineffective assistance of counsel that must be raised in a Rule 32 proceeding. Even assuming expert testimony was necessary to establish this principle, *see State v. Moran*, 151 Ariz. 378, 383-84, 728 P.2d 248, 253-54 (1986); *State v. Lindsey*, 149 Ariz. 472, 473-74, 720 P.2d 73, 74-75 (1986), the prosecutor's remarks alone could not have deprived him of a fair trial and the error, therefore, cannot be characterized as fundamental. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607 (error is fundamental if “of such magnitude that the defendant could not possibly have received a fair trial”), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Given the totality of

the record, including the victim's own testimony and impeachment, we fail to see how the prosecutor's speculations, such as they were, about why she had made inconsistent statements and recanted, could have affected the outcome of the case.

¶11 Although counsel concedes the motion for new trial was untimely, he appears to suggest the issues raised in the motion could be argued on appeal and seems to be asking us to consider them. Lewis had asserted he was entitled to a new trial based on the admission of the other-act evidence through the 9-1-1 tape and the trial court's admonishment of one of the witnesses about perjury. Counsel suggests that when the court warned the witness and explained if she lied she could be charged with perjury, it could be viewed as "implied vouching" and "judicial interference with the jury's independent evaluation of the evidence." But as counsel notes and the court pointed out, the motion was untimely; the verdicts were rendered on May 14, 2010, and the motion for new trial by counsel was filed on May 28, 2010. The court lacked jurisdiction to rule on the substance of the motion and so, too, do we. *See State v. McCrimmon*, 187 Ariz. 169, 171-72, 927 P.2d 1298, 1300-01 (1996) (trial court lacked jurisdiction to address motion untimely pursuant to precursor to Rule 24.1(b)); *see also State v. Wagstaff*, 161 Ariz. 66, 70, 775 P.2d 1130, 1134 (App. 1988) (time limits for filing motion for new trial jurisdictional; motions not filed within ten days of verdict are without effect and appellate court will not review denial by trial court).

¶12 Nor did the trial court err in failing to address Lewis's pro se motion for new trial. Lewis was represented by counsel and was not entitled to hybrid representation. *See State v. Murray*, 184 Ariz. 9, 27, 906 P.2d 542, 560 (1995).

¶13 As requested, we have reviewed the entire record for fundamental, reversible error but have found none. We have discovered, however, that the sentencing

minute entry characterizes count six, administering intoxicating liquors, as a class three felony. The offense is a class six felony, *see* A.R.S. § 13-1205(B), and the corresponding sentence of 5.75 years' imprisonment that the trial court imposed is the substantially aggravated term for a class six, category three, non-dangerous, repetitive offense. *See* A.R.S. § 13-703(C), (J).¹ We therefore affirm the convictions and the sentences imposed, correcting the sentencing minute entry with respect to count six.

/s/ *Peter J. Eckerstrom*

PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ *Garye L. Vásquez*

GARYE L. VÁSQUEZ, Presiding Judge

/s/ *Joseph W. Howard*

JOSEPH W. HOWARD, Chief Judge

¹The version of the statute in effect at the time Lewis committed the offenses is the same in relevant part as the current version. *See* 2008 Ariz. Sess. Laws, ch. 301, § 28.